APPENDIX A

[R. 582]

DECISION AND ORDER ON HAWAII'S SENATE REAPPORTIONMENT PLAN OF APRIL 14, 1965

This court has now before it the Hawaii State Legislature's H.B. No. 987, S.D.1, C.D.1; H.B. No. 773, S.D.1, C.D.1; and H.B. No. 986, setting forth that body's response to this court's order of March 9, 1965, viz., presenting (a) a plan for the provisional reapportionment of the Senate on the basis of the voters registered for the 1964 general election; (b) a proposed constitutional amendment encompassing the same plan; and (c) a submission to the electorate in 1966 of the question of calling a constitutional convention.

The road by which the above bills reached this court is tortuous. In August of 1964, when this court first heard this case, the Legislature of Hawaii was then sitting in special session called by the Governor of Hawaii for the specific purpose of attempting to devise a scheme of legislative reapportionment which would be constitutionally valid. The legislature at that session failed to agree on any reapportionment plan. After a hearing in January 1965, this court, on February 17, 1965, found that Article III, Section 2, of the Hawaii State Constitution fixing the number of senators per senatorial district, as well as the proviso at the end of the sixth paragraph in Section 2 of Article XV of the constitution, were invalid, "determined that the Senate *at least* must be reapportioned before the 1966 general election," and enjoined the Third State Legislature in its regular 1965 session from passing any but preliminary "housekeeping" acts until it had set up the machinery for the convening of a constitu-

tional convention to amend the State's legislative scheme of apportionment before the 1966 election. (Emphasis added.)

On March 1st, 1965, the legislature, then convened in regular session, requested this court to alter its order of February 17th so as to permit the legislature itself during that session to pass legislation:

(a) enacting a provisional plan for reapportioning the senate on the basis of the 1964 registered voters, to be effective for the 1966 election and until a constitutional amendment on reapportionment had been adopted by the people of Hawaii as provided in the constitution;

(b) adopting a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment plan to be presented to the electorate for ratification at the 1966 general election; and

(c) submitting to the electorate at that 1966 election the question, under Article XV of the State constitution: Shall there be a convention to propose a revision of or amendments to the constitution?

Counsel for all parties to the suit were in accord with the objectives outlined in the motion, and this court was satisfied from the representations made that the constitutional convention route prescribed by its February 17th order would be very expensive and perforce would demand the devotion of great time and effort from the people of Hawaii. The court, then, also believed that the legislators, each and all, would recognize their obligations to the entire electorate of Hawaii, would rise above any possible self-interest, would heed the admonitions of the Attorney General,

and would certainly note the flashing red lights of the caveats set out in this court's order of February 17th, viz., that a constitutional convention *in addition* to providing for reapportionment of the senate might also consider (1) whether the registered voter population should continue to be used as the basis for apportionment, or some other type of population basis should be adopted; (2) "whether it is better to have one or both houses of the legislature composed of single member representative districts, or to have and *justify*[9] one or both houses composed in whole or in part, of multi-member or floterial districts. (Note)[9] *Butcher* v. *Bloom*, 203 A.2d 556, 572-73" (emphasis added); (3) whether there should be a change in the date of decennial reapportionment; and (4) whether there should be redistricting of the representative districts.

This court therefore, by order of March 9, 1965, altered its February 17th order to permit the legislature (a) to enact a provisional reapportionment and redistricting plan for the senate; (b) to adopt "a proposed constitutional amendment embodying *pertinent* provisions of the foregoing reapportionment and redistricting plan" for submission to the electorate at the 1966 general election (emphasis added); (c) to enact legislation to submit to the electorate the question: Shall there be a convention to propose a revision of or amendments to the constitution? This order, like the one of February 17th, demanded that the plan be approved by this court; failing approval, the order of February 17th demanding legislation for implementing a constitutional convention would again become effective.

On March 18th this court was advised that a provisional plan, in substance approved by both houses,

was then in conference committee and about ready to be presented to this court, whereby the senate was reapportioned by dividing the State into the same original six senatorial districts, changing only the number of senators allocated to each district, based upon the use of the method of equal proportion. By that March 18th plan, two senators were apportioned to the first senatorial district—East Hawaii; one to the second—West Hawaii; two to the third—Maui; nine to the fourth—Southern Oahu; ten to the fifth—the remainder of Oahu; and one to the sixth—Kauai.

The legislature quickly thereafter was informally made to understand that such a grossly lumpy apportionment of senators, whereby forty per cent of the entire senate would come from one senatorial district and thirty-six per cent from another alongside, could never be approved, and the plan was forthwith withdrawn from conference committee for reconsideration by the house of representatives. Shortly thereafter, this court flashed an even brighter red light on its caveat number (2) above by informally indicating that because Hawaii had a multi-member district house, any other than single member senatorial districting would have to be justified to this court.

On April 14th, 1965, the legislature passed and sent to this court the numbered bills identified *supra:*

A. H.B. 987, its proposed provisional senatorial reapportionment plan; H.B. 773, its proposed constitutional amendment embodying that same plan; and H.B. 986, submitting to the electorate in the 1966 general election the question of the calling of a constitutional convention. By H.B. 987, the State was divided into eight senatorial districts, viz.:

County	Senatorial District	No. of Senators	1964 Registered Voters per District
Hawaii	First	3	28,130
Maui	Second	2	18,786
Honolulu	Third	3	27,073
"	Fourth	4	35,780
"	Fifth	4	39,361
"	Sixth	4	40,629
"	Seventh	4	37,336
Kauai	Eighth	1	12,266

B. Exhibits A and B, attached to the plan, the same being the reports of the conference committee on the proposed provisional plan (H.B. 987), as well as the proposed plan for the constitutional amendment (H.B. 773) embodying the same, setting forth the conference committee's "justification" for wholly abandoning any attempt to redistrict the senate on a single member district basis.

Senate exhibits Nos. 5 and 6 (maps also filed), outlined the geographical boundaries of the respective senatorial districts of Honolulu.

The court would agree that the number of registered voters per senatorial district and apportioned to the four basic areas, viz., three to the County of Hawaii, two to the County of Maui, nineteen to the City and County of Honolulu, and one to the County of Kauai, conforms to the standards required under the method of equal proportions prescribed by the Constitution of the State of Hawaii and thus meets that one test of constitutionality. *Roman* v. *Sincock,* 377 U.S. 695 (1964); *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

In the attached committee reports, the reasons given, i.e., "justification," for choosing multi-member districts

of three and four senators per district were substantially: (1) single-member districts would tend to cause the senators therefrom to be concerned with localized issues and ignore the broader issues facing the State, and therefore it might fragment the approach to state-wide problems and programs to the detriment of the State; (2) historically the members of the house had represented smaller constituencies than members of the senate, and tradition and experience had proved that balance desirable; (3) multi-member districts would increase the significance of an individual's vote by focusing his attention on the broad spectrum of major community problems as opposed to those of more limited and local concern; (4) to set up single-member districts would compound the more technical and more intricate problem of drawing the boundaries; (5) population shifts would more drastically affect the boundaries of many smaller single-member districts—to a greater degree than would be found in larger multi-member districts, citing Oahu's population boom and subdivision development.

In drawing the district lines the legislature reported that it "relied very heavily" on the standards of compactness and contiguity—"geographical separation and long-established representative precinct lines."

Except for the slightly misleading conclusion that the third senatorial district was *primarily* a suburban area, and that the fourth senatorial district was composed of substantially plantation and suburban communities, from the report it appears that no other criteria, save number of registered voters, geographical boundaries and historical representative district lines were considered or used in forming the plan. Apparently, ethnic, political, industrial, economic, social,

occupational factors, and community of interests and problems were given little if any consideration by the legislature.

The testimony of Senator Sakai Takahashi, chairman of the conference committee, at the April 15, 1965 hearing on the plan, summed up the legislature's underlying raison d'etre with his statement: "We thought it fair."

Mr. Robert Schmitt, statistician, who had testified at length in the hearing of August 1964, again a witness, testified in favor of applying the law of large numbers, viz., that smaller areas with small numbers fluctuate in much greater proportion than do larger areas with larger numbers, to senatorial districts. He, however, had *not been consulted* on the problem of the multi-member districts vs. single-member, or the problem of district lines.[1]

In analyzing the plan, all Mr. Schmitt could say for the third senatorial district was that it had excellent statistical boundaries.[2] It was logical to deduce from his testimony that the boundary between the fourth and fifth senatorial districts had accidentally resulted in an excellent *line of division,* in that it separated the

[1] In its (unsubmitted) plan of March 18th, *supra*, p. 4, two senators were to be elected from East Hawaii, and one senator from West Hawaii. The total registered voters in 1964 in East Hawaii was 20,770, and in West Hawaii was 7,360. In the present provisional plan, this division of the Island of Hawaii was dropped and three senators were to be elected from the first senatorial district, which would now include the entire island. Of the seven senators presently elected from districts one and two, five live within a short distance of each other in Hilo, in East Hawaii.

[2] The location of the residences of two of Honolulu's present total of ten senators is in this district.

military area, i.e., military housing, etc., from the city proper. The best that he could say, however, for the line between the fifth and sixth senatorial districts was that it neatly separated the central business district from residential areas alongside. The line between the sixth and seventh senatorial districts was historical.

Mr. Schmitt, in contradistinction to the conference committee, found it necessary to analyze the representative districts and criticized many of them as being far too small, e.g., the first—on Hawaii, the thirteenth—Kalihi, on Oahu; or much too large, e.g., the fifteenth—with its six representatives. Schmitt pointed out that within the fifteenth district, in the Moiliili area, there was a higher proportion of persons of Japanese ancestry than in any census tract of the island, yet Waikiki, primarily concerned with tourist service, was the second highest among census tracts in percentage of Caucasian residents. Also, high-level professional, technical and managerial people tended to live in Waikiki or upper Manoa,[3] whereas operatives, laborers, clerical workers, middle and lower-middle income people lived in the central (Moiliili, etc.) area.

Mr. Schmitt stated that the fifth senatorial district likewise encompassed a highly heterogeneous area containing a multitude of Caucasian widows in the uplands area, and an overabundance of Filipino males in the seaward portion of the district. The twelfth representative district, therein, had a very high proportion of persons of foreign birth or Asiatic ancestry,

[3] The residences of the three senators from the present fourth senatorial district showed that all lived only a very short distance apart in the upper Manoa area of the fifteenth representative district.

of the lower-middle socio-economic group.[4] Schmitt's only other comment regarding the fifth senatorial district was that the boundary between the twelfth and thirteenth representative districts, i.e., within the proposed fifth senatorial district, had a very unfortunate location.

Schmitt also pointed out that within the seventh senatorial district were two clearly defined and geographically, economically and socially divided groups. In Palolo in the sixteenth representative district area were found the lower socio-economic laborers, operatives, and clerical workers, and in the Waialae-Kahala and Aina Haina areas were the highly professional and managerial class. In the latter area the median annual family income in 1959 was almost $16,000, whereas in Palolo it was $3,000.

From the committee reports and the testimony of Senator Takahashi, it is obvious that the legislature gave sparse, if any, consideration of any of the facts or factors pointed out by Mr. Schmitt, in devising its scheme of multi-member senatorial districts for Oahu.

Although we initially determined that the house of representatives was not unconstitutionally apportioned, by that decision we did not say that those representative districts had been perfectly laid out. We agree with Mr. Schmitt that, compared to the make-up of all other representative districts in the State, the fifteenth is too large.

There can be no truly representative government without a system of apportionment which provides

[4] Similarly, three senators from the fifth district likewise lived a short distance from each other in the twelfth representative district.

potentially equal representation to the divergent factors incorporated within the body politic. Our own representative form of government demands checks and balances, devices and procedures to channel the many and diverse interests of the people into the making of a stream of legislation that produces for each person in that state the maximum beneficence possible. Methods of securing this desired objective were pointed out in *Reynolds* v. *Sims, supra,* at 576-77:

> "Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis."

In reapportioning and redistricting the senate, both houses overlooked the fact that, to be valid, the makeup of the senate must positively complement the makeup of the house, to provide the vital equality of voter representation. Both houses of the legislature seemingly forgot that the schemes of districting *each* house, when conjoined, must offer compensating advantages to the voters—not only to those voters within each representative district, be it senate or house, but to all voters throughout the State. While there perforce

must be some overlap of representation with the several senate and house districts, that overlap must not be such as to concentrate and intensify the voting power of a single senatorial-representative district to the point that the voters therein have a built-in disproportionate representational advantage over any other voters of the State.

If the achievement of this goal is even to be approached, there should not be any monolithic political units of representation in that all-inclusive system of apportionment. Unless, within any single geographically defined political area or unit, there is a meaningful and substantial difference in the composition of that body of electors therein, whose combined votes elect a senator, from that body whose combined votes elect a member of the house, then the demanded differing complexions and collective attitudes are lost, the necessary cross checking and resulting balance is absent, and the majorities therein are given a disproportional monolithic command, not only within the narrow political unit, but also within the legislative bodies. Such artificially concentrated political power negates any notion of equality of representation for the minorities entrapped therein, as well as for all other electors of the State outside such a monolithic political unit.

"However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside." *WMCA* v. *Lomenzo,* 377 U.S. 633, 653.

The Hawaiian legislature, whether innocently or de-

signedly, has, nevertheless, built just such monoliths into its reapportionment scheme.

In its effort to achieve its objective of multi-member (three and four) senatorial districts in Honolulu, the legislature made the boundaries of the third senatorial district and the eighth representative district one and the same. Thus from *one* political and geographical unit would be elected four representatives and three senators—seven members of the legislature all responsible to and representing exactly the same constituency! Similarly, the sixth senatorial district was fashioned almost entirely from the fifteenth representative district, with the result that from the fifteenth representative unit, i.e., from the dominant three-fourths of the voting population of that senatorial district, would come six representatives and four senators. (31,302 of the senatorial district's total of 40,629 voters reside in the fifteenth representative district.)

While it is a fundamental factor under the decisions of The Court, population is not the sole definitive measure for setting up either representative or senatorial districts. Compactness and contiguity of the territory are admittedly also factors, but community of interests, community of problems, socio-economic status, political and racial factors—each and all must be considered, and not only must the electoral districts be laid out with the totality of those factors having been taken into consideration, but even more, the sum total of all of the districting must result in substantial equality of meaningful representation to each and all of the voters of the State. "(A)ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation,

whatever their income and wherever their home may be in that geographical unit." *Gray* v. *Sanders,* 372 U.S. 368, 379. As indicated, not only was there no totality of consideration of the above factors in setting up the senatorial districts on Oahu, but there was even less totality of consideration of the factors of equal representation to all voters on Oahu and the rest of the State.

Here, the realistic political weight of the voters in both the third and sixth senatorial districts would far exceed the political weight of any voter in any other district, not only in Honolulu but in any other county of the State. It is patent to the court that both the house and the senate, in setting up the senatorial plan either failed or refused to recognize the effect that such a plan would have upon the basis for representation of the entire voting population. Both the Hawaiian senate and house ignored the admonition of the Supreme Court:

"(I)n reviewing a state legislative apportionment case this court must of necessity consider the challenged scheme *as a whole* in determining whether the particular State's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the State's voters, in both houses of a bicameral state legislature." *Maryland Committee* v. *Tawes,* 377 U.S. 656, 673. (Emphasis added.)

This court heretofore said that the house was not unconstitutionally apportioned. This court indicated the means by which the senate could be apportioned to give to every voter the equal protection and equal representation that he is entitled to without disturbing the makeup of the house, but because both houses failed to look at the political scene in its totality and instead viewed the reapportionment scheme of the senate as if it were something that could be fashioned without consideration of its tight juxtaposition to the house of representatives, each house of the legislature jointly and separately took such a myopic view of the political problem involved, that they failed to see and anticipate the overall result of arbitrarily joining their independently constructed senatorial plan with the existing representative scheme.[5] As indicated, both houses failed to heed the words of the Supreme Court, as well as any of the red lights this court had flashed. Both houses failed to heed the advice of the Attorney General of the State of Hawaii, and the end result, based as it is upon reasons which fall very, very short of justifying the resultant multi-member districting of both houses, fails to give to each and every voter of the State of Hawaii the fundamental equality of representation to which each is entitled under the Fourteenth Amendment.

Even if the above, alone, were not enough to render the proposed scheme invalid, it is manifest to this court that the legislature's adamant insistence on three and

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[5] As foretold in *Fortson* v. *Dorsey*, 379 U. S. ..... (1965) "it might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."

four-member senatorial districting was the conscious or unconscious—though not unnatural—reluctance of the affected senators to carve out single-member districts which thereafter would in all probability result in a political duel-to-the-death with a fellow and neighbor senator. To have cross-cut any of Honolulu's eighth, twelfth or fifteenth representative districts in order to mark out single-member senatorial districts would, with practical certainty, have left two or three present incumbents to compete head on for a single senatorial seat.

Likewise, the shift on Hawaii from the double, 2–1 senator district scheme, tentatively adopted on March 18th, to the single 3-senator district in the instant plan, was an unmistakable application to East Hawaii's incumbent senators of that same factor of political self-preservation implanted into the Honolulu districting scheme.[6]

This court finds that the present multi-member district scheme of senatorial reapportionment resulted, in a material part at least, from gerrymandering.

We find the proposed plan does not meet the test of equality of representation set down by our Supreme Court and is invalid. We therefore do not approve the plan.

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[6] "(I)n the absence of any reasonable justification (historical or otherwise), such districting (creation of single-member and multi-member districts) might be the result of gerrymandering for partisan advantage and, in that event, would be arbitrary and capricious. In the light of the constitutional pitfalls inherent in such a districting scheme, it would be more prudent to approach the matter of apportionment by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts." *Butcher* v. *Bloom*, 203 A.2d 556, 573.

Circuitous or expensive as it may be, the route set out by the Constitution of this State, viz., by way of a constitutional convention, must now be followed. Inasmuch as the plan set forth in H.B. 987 cannot be and is not approved by this court, IT IS THEREFORE ORDERED:

(1) The stay order of this court dated April 19, 1965, is rescinded, effective forthwith; and

(2) As indicated in our Final Order of March 19, 1965, item 4 on pages 19-20, and item 6 on pages 20-21 of the Decision and Order of this court dated February 17, 1965, be and they are hereby automatically reinstated and now remain and shall continue in full force and effect until further order of this court.

As may be noted, this court has not herein discussed H.B. 773. We are advised that it was able to pass the senate by but the barest majority, 13 - 12, far short of the two-thirds demanded by the State constitution for the adoption of a proposed constitutional amendment. The same also has not yet lain on the desk of the Governor for the ten days prior to final adoption, as provided by the constitution.[7] Therefore, procedurally, the same has not yet been submitted to us. *Wright* v. *Rockefeller*, 376 U.S. 52, 58. Even if it were, nevertheless, in view of our decision on the provisional plan, H.B. 987, we would not and now do not find it neces-

[7] In order to move the reapportionment problem with the greatest celerity, this court, nevertheless, had advised all parties that a provisional plan of reapportionment could be submitted to this court and a hearing had thereon immediately after the same was passed by the legislature and before the ten-day period during which a proposed amendment must lie on the desk of the Governor before the same can be adopted and passed. The instant hearing therefore was solely upon the matter of the proposed provisional plan.

sary to consider the validity of the proposed amendment, H.B. 773, or the question proposed by HB. 986.

This court continues to retain jurisdiction of this action for all purposes.

This decision shall take effect forthwith.

Dated: Honolulu, Hawaii, this 28th day of April, 1965.

GILBERT H. JERTBERG
Circuit Judge

WILLIAM T. BEEKS
District Judge

MARTIN PENCE
District Judge

[R. 370]

DECISION AND ORDER

On August 13, 1964, the plaintiffs, citizens and residents of the State of Hawaii and qualified voters in their respective senatorial and representative districts, on their own behalf and as a class action on behalf of all other citizens, residents and voters in the State of Hawaii similarly situated, filed this complaint against William S. Richardson, Lieutenant Governor of Hawaii (he being responsible for the supervision of elections), seeking to enjoin Richardson from performing any duties relating to the nomination and election of candidates for State legislative offices unless the State legislature enacted a valid reapportionment plan for use in the 1964 elections, praying that this court should in any event make certain that

the 1966 election would be conducted under an apportionment plan that would meet the requirements of the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs alleged that the Constitution of the State of Hawaii apportioned the senate on the basis of geography and not population, and the house of representatives on the basis of registered voters and not population, and thus the State's scheme of apportionment was unconstitutional under the Fourteenth Amendment, in the light of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), and its companion cases of the same date: *Maryland Committee* v. *Tawes*, *Lucas* v. *Colorado General Assembly*, *Davis* v. *Mann*, *WMCA* v. *Lomenzo* and *Roman* v. *Sincock*.

The Governor of the State, as well as all state legislators, both senators and representatives, filed their appearance as either intervening plaintiffs or defendants. (After the 1964 elections, all but one of the newly elected legislators likewise filed their appearance.)

A three-judge district court thereafter convened, found that it had jurisdiction under 28 U.S.C. Secs. 2201 and 2281 et seq., as well as under the Civil Rights Act, 42 U.S.C. Secs. 1983, 1988, and the court, after full hearing, on August 26, 1964, because of the imminence of the 1964 elections and the disruptive effects which an injunction would have had thereon, and because the State legislature at that date was convened in special session for the specific purpose of considering the problems of reapportionment, denied the motion for a preliminary injunction and set a hearing on the merits for January 11, 1965. (*Cf. Roman* v. *Sincock, supra.*) The legislature failed to agree on any

reapportionment plan, and this decision follows the January hearing.

The Constitution of the State of Hawaii, after being hammered out at a Constitutional Convention composed of nonpartisan delegates elected from all parts of the Territory, was adopted July 22, 1950, to become effective immediately upon the admission of Hawaii into the Union as a state. Hawaii was so admitted on August 21, 1959. The Constitution prescribes a senate of 25 members, obviously and admittedly apportioned basically upon the geographical and political divisions of the State, and 51 representatives apportioned as hereinafter described.

Hawaii is unique in many respects. It is the only state that has been successively an absolute monarchy, a constitutional monarchy, a republic, and then a territory of the United States before its admission as a state. Because each was insulated from the other by wide channels and high seas (*C.A.B.* v. *Island Airlines*, —— F.Supp. —— (October 8, 1964)) and historically ruled first by chiefs and then royal governors, after annexation the seven major, inhabited islands of the State were divided up into the four counties of Kauai, Maui, Hawaii and the City and County of Honolulu.[1] All this resulted in a strongly centralized form of government.

By 1950, Honolulu, the State capital, had by far the largest population of any county, an essentially urban population, and had become an industrial, manufac-

[1] The artificial and isolated County of Kalawao has always been strictly a Hansen's disease treatment area, operated and controlled by the Board of Health of the Territory and State. It votes with Maui County for State Legislators.

turing, military and tourist center. The other three counties remained essentially rural and primarily concerned with agriculture and ranching. With the State having complete control over the judiciary, taxation, education, public health and welfare, etc., it was normal therefore that the three more rural counties of Kauai, Maui and Hawaii would not wish to leave such centralized power, particularly control over the State's purse strings, with urban Honolulu.

Patterning itself after the makeup of the United States Congress, Article III, Section 2 of the State Constitution apportioned the 25-member senate on a basis which enabled the senators of the three counties outside of Honolulu to have numerical control over that body. This was deliberately done in order to preserve the then nationally approved concept of checks and balances between rural and urban populations.

By Article III, Section 4, the house of representatives was apportioned under "the method of equal proportions," i.e., the same method as used in apportioning the members of the House of Representatives of the United States Congress,[2] giving the representatives from the County of Honolulu, with its larger population, potential control of the house. Both single and multi-member representative districts were set up throughout the State.

Under this same Section 4, using the method of equal proportions, the State legislators were apportioned among the four "basic areas," viz., the four counties,

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[2] Proceedings of the Constitutional Convention of Hawaii, Volume II, (Proceedings), pp. 112-123. See also, *Reynolds* v. *Sims*, *supra*, note 10.

on the basis of the number of voters registered at the last preceding general election, and within the counties each representative district had its representation determined by the same method.

Under this same Section 4, the governor was mandated to reapportion the members of the house of representatives on or before June 1 of the year 1959, and at successive 10-year intervals thereafter. On May 1, 1959 (pursuant to Public Law 895, 84th Congress, 2nd Session), the Governor of Hawaii did reapportion the State in the above manner, and such reapportionment transferred increasing control to Honolulu.[3]

All parties before this court conceded (as was also determined by the Supreme Court of Hawaii in *Guntert* v. *Richardson,* 47 Hawaii —— (July 27, 1964)) that Article III, Section 2, relating to the composition and apportionment of the State senate is indisputably invalid under *Reynolds* v. *Sims, supra.*

From the inception therefore, it was obvious that Hawaii's Constitution must be amended, at least to provide for a valid apportionment of its senate. In connection with any constitutional reapportionment of the senate, it must be noted that Article XV (Revision and Amendment), Section 2, para. 6, contains the following proviso:

". . . . provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties."

[3] After the Constitutional Convention, Congress put into permanent effect the reapportionment provisions of the proposed State Constitution. (*Davis* v. *Quinn,* 43 Hawaii 261, 269).

As appears in the Proceedings, pp. 761-64, this proviso was specifically inserted in order to freeze representation in the senate, and it gave to the rural counties what amounted to the right of veto over any attempt to change the representative makeup of the senate. This proviso is so closely tied in with the admittedly invalid scheme of senatorial apportionment that it, too, is likewise constitutionally invalid and falls along with Article III, Section 2.

Plaintiffs urge that Article III, Sections 3 and 4, relating to apportionment of the house, are likewise invalid because they are a part of the total scheme of legislative apportionment, inferring that the house would not have been apportioned as it was but for the senate being apportioned as a built-in check in setting up the "checks and balance" scheme of the United States Congress.

This Court finds that this is not necessarily true. Apart from one problem discussed immediately below, nothing has been called to our attention and we find no evidence—not even in the Proceedings—that the Constitutional Convention would have apportioned the house in any other way than it did.[4]

Plaintiffs urge that in any event, the house of representatives is unconstitutionally apportioned because

[4] In connection with both the senate and the house of representatives, plaintiffs have claimed that the *number* of legislators in each house, viz., 25 and 51, are part of some invidious scheme. Exhibit 14, Table 14 clearly illustrates that there is no built-in magic or invidiousness in the use of such numbers. The matter of the size of each legislative body and the adoption of a 15-member senate and 31-member house, or a 21-member senate and 41-member house, as well as the ultimately approved 25-member senate and 51-member house were thoroughly explored by the Convention. (Proceedings, pp. 89-101, 112-132)

apportionment thereof is based upon the number of voters registered at the last preceding general election (Art. III, Sec. 4), and not upon a gross, i.e., total population basis.

Article II, Sections 1 and 2, covering suffrage and elections, provides, in substance, that every literate United States Citizen who is compos mentis and not an unpardoned felon, 20 years old or more, residing in the State not less than one year next preceding the election, and a registered voter, shall be qualified to vote. This court finds nothing in Article II which is constitutionally invidious as discriminating against any one on the basis of race, color, creed, employment or geographical location, and as indicated in Article III, Sections 2 and 3, defining who may elect senators and representatives, it appears that the term "qualified voters" is used practically synonymously with registered voters under Article III, Section 4.

This court is not prepared at this time to accept plaintiff's premise that total population is the *only* basis upon which apportionment of state legislatures can constitutionally be based. The Court in *WMCA* v. *Lomenzo, supra,* notes that "New York uses citizen population instead of total population, excluding aliens . . . , for purposes of legislative apportionment" and apparently found nothing invidious in that fact. In *Maryland Committee* v. *Tawes, supra,* The Court said:

"Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall, representation accorded to the *State's voters,* in both houses of a bicameral state legislature." (Emphasis added.)

The Court thus re-expressed what it said in *Gray* v. *Sanders*, 372 U.S. 368, 379:

> "Once the geographical unit for which a representative is to be chosen is designated, *all who participate in the election* are to have an equal vote—whatever their race, . . . their income, and wherever their home may be in the geographical unit." (Emphasis added.)

The Court has said time after time throughout *Reynolds* v. *Sims, supra*, and the companion cases only that "both houses must be apportioned substantially on a population basis." (Emphasis added.)

Plaintiffs urge and have presented figures showing that on the basis of the 1960, 1962 and 1964 population, the house of representatives is malapportioned. To begin with, paraphrasing *Guntert* v. *Richardson, supra*, 1950 and 1958 registered voters, and 1960, 1962 and 1964 population, are not comparable figures. The Court does not demand that legislatures be reapportioned annually. *Reynolds* v. *Sims, supra*, Subject VIII. This court, at this time, can only determine if the basis of apportionment, when adopted in 1950 and when used for reapportionment in 1959, did in fact at those times result in apportionment "substantially on a population basis."

The Convention tried "to write into this Constitution a proposal that would not deny a single individual in this territory the right to suffrage." (Proceedings, p. 49). The basis of apportionment by population vs. registered voters was thoroughly discussed.

> "The idea among other things was to make the districts as nearly equal population-wise as possible. . . ." (Proceedings, p. 107)

. . . .

"One of the reasons why the reapportionment directed by the Organic Act[5] was not carried out was because that act required reapportionment on the basis of citizen population. A breakdown of the population according to this standard has not been locally available. Total population figures for the territory are shown by census tracts which do not necessarily coincide with locally defined areas. As a practical matter, the number of registered voters was found to bear a reliable and fairly uniform relationship to total population, although it favors slightly the neighbor islands where the percentage of persons who have registered to vote is from one to two per cent higher than for Oahu. It was in recognition of the potential difficulty in obtaining figures which would show citizen population, or figures which would show total population by desirable districts, that the basis for reapportionment of the members of the House was chosen as the number of registered voters." (Proceedings, p. 107)

"The problem as stated in the report and as stated by the committee chairman this morning of using population in these districts is that it is next to impossible to obtain accurate population figures for the districts that we want to use or even for the old precincts or for any districts, unless you should take your representative districts to be the same districts that are used by the Census Bureau. Now it is quite possible that by the next census we could convince the Census Bureau that they should break their areas up into the areas that we may decide upon for representatives.

". . . . [I]n checking this over in the committee we found that there was actually percentage wise or using the method of equal proportions or anything

[5] Organic Act, Secs. 60, 62.

else, very little difference whether we used registered voters, votes cast or population." (Proceedings, p. 124)

The testimony of Robert Schmitt[6] (see Transcript of Proceedings of August 1964 hearings (TR) beginning p. 80) illustrated with certainty that the term "population" as determined by the Census Bureau was far from an accurate or reliable method of determining the true number of *residents* of a given area—at least in Hawaii.

"The 1960 Census definition of population used in its compilation, ... included all armed forces stationed ashore in Hawaii, regardless of their legal or voting residence. It included all men aboard ships in Hawaii ports on the census date . . . April 1st, 1960; that is [if] a ship tied up in Kapalama Basin or in Pearl Harbor, Ford Island, the entire crew of that ship was assigned to that geographic area.

"This was also true in the case of civilian ships. For example, the Ala Wai Yacht Harbor included a number of house boats and yachts which were enumerated in Hawaii." (TR 80)

". . . If the person on the night preceding the census had been there . . . each hotel or transient accommodation was enumerated. . . .

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[6] Robert Schmitt: employed by the Department of Planning and Economic Development of the State of Hawaii; a member of the American Statistical Association; member of the Population Association of America and author of some 60 articles in professional journals; Research Development Analyst in charge of the Research Division of the Honolulu Redevelopment Agency for four years; in charge of research for the Seattle City Planning Commission; author and editor of the Statistical Abstracts of Hawaii; census tract key person for Honolulu of the U. S. Bureau of Census for many years; holds a Master's Degree from the University of Cincinnati, with additional graduate work from the University of Hawaii, University of Michigan and the University of Washington. (TR 69-70)

"[T]hey enumerated every person in Hawaii at that time, but they then reallocated them to their home states. . . ." (TR 81)

". . . We don't know how many were here at that time. *But we made an estimate.* . . . The Census Bureau did *not* report how many such persons were reallocated." (Emphasis added.) (TR 82)

". . . There is no certainty how many were reallocated. We assume that all of them were." (TR 83)

"There were two ships [picked up in the 1960 census], one the Kiwishiwi . . . and the other the Black Hawk. . . . [T]he total personnel of perhaps four hundred . . . were assigned to [an area of Waikiki along the Ala Wai Canal]. . . . [H]ere we had approximately four hundred of the ship's crews . . . classified as military . . . who were assigned to this [Waikiki] enumeration district. . . .

"[I]n 1920 . . . they inadvertently threw 3,000 Pearl Harbor people into the . . . Honolulu judicial district." (TR 106-07)

"In 1960, the number of members of the Armed Forces . . . was either 54,000 or 47,000 . . . [or 42,122 if we subtract the 1960 civilian population of 590,650 from 632,772—See Ex. 14, p. 12], the census count was 47,000, and the Department of Defense counted 54,000." (TR 116)

Since the total civilian population of Hawaii (excluding the military) in 1960 was but 585,505 (Ex. 14, Table 12), it is seen that the military did account for about 10% of the total population. (1960 Census estimate, Ex. 15, Table 9.) Hawaii has become the United States' military bastion for the entire Pacific and the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear. If total population were to be the only acceptable criteria

upon which legislative representation could be based, in Hawaii, grossly absurd and disastrous results would flow from a blind adherence to "the elusive 'one person-one-vote' aphorism." (Mr. Justice Harlan in *Fortson v. Toombs,* —— U.S. ——, (January 18, 1965.)

For example, if Hawaii's reapportionment year had been 1944, when the civilian population was 464,250 and the military population was 407,000, then areas which normally might have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature—for the following ten years!

In contrast to the above, in 1950, with a civilian population of 472,780, there were but 21,000 military in Hawaii—less than 5%. In two years, this had jumped to 55,000. In 1958 there were 55,000 military, with a civilian population of 555,222. Two years later, there were 79,000 military in Hawaii. (Ex. 15, Table 11) As the plaintiffs have admitted, if the State were reapportioned at the present time on a straight total population basis, the *Fifth* senatorial district, containing within its bounds most of the military and naval installations of the State, would be entitled to 13 senators—a majority of the Senate!

A theoretical proposed redistricting of the City and County of Honolulu (Ex. 8) based on total population under the *1960* census, with the primary consideration being substantial equality of *total population*, gave Oahu 20 senators out of 25, and 41 representatives out of 51. (TR 189—Schmitt) A result of such proposed redistricting was that the largest representative district in point of population would be the one that in-

cluded Schofield Barracks "in fact, it is completely Schofield Barracks," (TR 190) i.e., military population. Although it would thus become the largest representative district in the State, "in point of registered voters [it would be] the smallest district on the island." (TR 191) And Schmitt admitted, in testifying concerning Exhibit 17, that it was possible in a single representative district so reapportioned on a total population basis, for such a district to have almost no voters at all.

This court does not have before it the problem presented to the Supreme Court of Hawaii, in *In Re Robertson, Jr.*, 48 Hawaii —— (October 30, 1964), viz., the question of whether a service man's residence on a Federal military reservation precludes him from establishing his residence in Hawaii. If he so desires to become a resident of Hawaii, this court can only state that there is nothing in the State Constitution or the Hawaii statutes which per se excludes members of the armed forces from establishing their residence in Hawaii and thereafter becoming eligible to vote. This court finds no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise which is aimed at disenfranchising the military or any other group of citizens.

Not only does the fluctuating military population of the State make representation on the basis of total population politically suspect, but the large number of tourists[7] who continually flow in and out of the State and who, as above indicated, for census purposes are

[7] The Hawaii Visitors Bureau statistics show that tourists in Hawaii, for overnight or longer, numbered—in 1950, 46,593; in 1958, 171,588; in 1960, 296,517; in 1962, 362,145; in 1964, 510,000 (preliminary figure).

initially at least, counted as part of Hawaii's census population (10,000 estimated, 1960 census), would likewise result in gross inequity to citizens of the State eligible to vote, if total population were held to be the only constitutional basis for reapportionment in Hawaii.

The difficulties undoubtedly faced by the Constitutional Convention in determining the best method to set up a system giving equality of representation is further illustrated by references contained in Exhibit 14 on statistics based on the year 1960—not the year 1950 when the Constitution was adopted, or 1959 when the house of representatives was reapportioned. Exhibit 14, Table 1 shows that the total *civilian* population as of July 1st, 1960 was 590,650, with 202,059 registered voters or 34.2% registered. Table 3 shows the *total* population as 632,772, thus indicating but 31.9% of the population as having registered. Table 4, however, shows that out of the State population of 312,478 *United States citizens* (thus including the military) of voting age, the 202,059 registered voters accounts for 64.7% of all that class. Table 5 indicates that out of the *total* population age 20 or over (thus including non-citizens), of 360,193, 231,914 could qualify as being eligible to register. Thus even in 1960, the registered voters actually accounted for 87.1% of all of the possible *voting population* of the State of Hawaii.

That, in Hawaii, apportionment on a registered voter basis is not invidious per se, is further illustrated by Exhibit 14, Table 13, wherein it appears that 19 senators would be apportioned to Honolulu regardless of whether the basis was registered voters in the 1962 election or civilian population. Likewise, there is

shown but a difference of two representatives (38 - 40) for Honolulu in such projected apportionment of the house, a difference which might result from the application of the method of equal proportions.

Hawaii's centralized education system has resulted in an unusually literate citizenry, and interest in politics and strong drives to bring out the vote have resulted in a vote of from 88 to 93.6% of all registered voters during the elections of 1958, 1959,[8] 1960 and 1962. (Ex. 14, p. 12)

Representation based upon those eligible to vote, rather than registered voters, might conceivably have been a better solution, but neither in 1950 nor in 1958, as Schmitt testified (TR 96-98), was there statistical data available from which the necessary figures could have been gleaned and applied to the representative districts. As he also said, any attempt to determine the number of military personnel or their dependents who are eligible to vote in Hawaii by representative district "would strain the available statistical sources to the breaking point." (TR 98)

This Court does not hold that registered voters as a basis for representation is the perfect basis. Paraphrasing the words of The Court in *Fortson* v. *Dorsey*, —— U.S. ——, this court finds the use of registered voters as a basis of apportionment did not, in Hawaii, in fact "designedly or otherwise . . . operate to minimize or cancel out the voting strength of [any] . . . elements of the voting population." (At p.——) Nor did it in 1959 bring about that result.

As the records of the Constitutional Convention

[8] First political implementation under Statehood.

show (Proceedings 103-111), the districting, both for the senate and the house of representatives, followed along historical, political, geographic and physical lines. There was no gerrymandering in the invidious sense. As Dr. Schmitt testified (TR 96), the representative district lines sometimes cross statistical matters reported in the census, because the census divided up the State into census tracts. While for some of the cities of the State block statistics are available, nevertheless it is rather rare when the census tract coincides with the precinct in an election district. "There seems to have been an unfortunate disregard of precinct boundaries and representative district boundaries in laying out the census tracts and vice versa." (TR 96)

Plaintiffs have pointed to the result of the redistricting in Representative Districts Nos. 1 and 2—Puna and South Hilo on the Island of Hawaii—as proof positive that the districting brought about a result condemned in *Reynolds* v. *Sims, supra,* as unconstitutional, in that in 1959, given a man-average per representative of 3437 voters, Puna with a 1958 registered voter population of about 2209 was given one representative and South Hilo with a registered voter population of 13,836 was given but three (i.e., 4459 voters per representative)—ergo an arbitrary and invidious dilution of the votes of the South Hilo voters! While The Court did state:

> "It is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of person in another area would be counted only at face value, could be constitutionally sustainable",

this broad conclusion, however, was modified a few lines thereafter by the following:

"Weighting the votes of citizens differently, by any method or means, *merely* because of where they happen to reside, hardly seems justifiable." *Reynolds* v. *Sims, supra.* (Emphasis added.)

As was also stated by Mr. Justice Black in *Colegrove* v. *Green,* 328 U.S. 549, 569-71:

"[T]he constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be *designed* to give *approximately* equal weight to each vote cast. . . ." *Reynolds* v. *Sims, supra,* note 40. (Emphasis added.)

The record of the Proceedings (pp. 139, 141, 157) shows that in an endeavor to make all of the representative districts of the State large enough so that the figures would approach the 1950 common denominator of 2445, Puna (1st Representative District), when combined with Keaukaha (now in the 2nd Representative District) came to 2355. The delegates from South Hilo opposed this because geographically Keaukaha was separated from the nearest inhabited portion of Puna by a lava forest over six miles wide, traversed by but one road. It was an integral part of the City of Hilo, using that city's power, water, police, fire protection, schools and all public services. Its population was almost entirely of Hawaiian extraction; almost all of its inhabitants were employed only in Hilo; and basically, it had no community, ethnic or industrial bond or interest with Puna.

The voting population of Puna, on the other hand, was very predominantly of Japanese extraction, with

no urbanization whatsoever, and with almost its entire population employed by one sugar plantation.

Keaukaha had 644 voters. It was recognized that the 1711 voters of Puna ethnically, industrially and socially were a cohesive unit, and such districting, as a matter of practical politics, would have left Keaukaha with *no* real representation.

> "[Keaukaha] was put in Puna in the first place . . . [in] . . . an effort to get a larger number of voters in the district that was going to elect one representative. It should be the natural thing to put it in South Hilo as [the delegates from Hawaii County] propose to do it now and it would not disturb the allocation of voters between Puna and South Hilo, and North Hilo and Hamakua." (Proceedings, p. 157)

As a matter of fact, also, neither in Puna nor in South Hilo did the resultant number of voters per representative, then or in 1959, violate the method of equal proportions. This court finds ample justification for and no invidious vote dilution in the above districting.

As indicated above, this court cannot say that Hawaii's method of districting was part of any invidious scheme to disenfranchise any person or group, or to dilute the vote of any person. In hindsight, this court could say, as did Dr. Schmitt, that for the purpose of determining eligibility to vote in any precinct or district, it would be far easier to secure some such information if the districting and precinct lines also coincide with the census county divisions and census tracts. (TR 96)

There is nothing which appears in the Proceedings (pp. 173-74) to indicate that the ordering of reapportionment of the house in the year preceding that in

which the census is normally taken was part of a scheme to dilute the vote of any person, rather, that year was used because the 5th Legislative Session after the Constitutional Convention would have terminated its work in May 1959. Since reapportionment was based upon registered voters, the census figures did not appear to the delegates to have any application.

Obviously, if the rights of the citizens of Hawaii are to be protected, the Constitution of the State of Hawaii must be amended—and amended before the 1966 general elections. The action of the legislature in failing to provide for reapportionment during its special session called for that purpose only last summer was disappointing to this court—and undoubtedly to the Supreme Court of Hawaii. See *Guntert* v. *Richardson, supra.*

As pointed out by the Supreme Court of Hawaii in *Guntert*, any change in the representation from any senatorial district must be by constitutional amendment. This court concurs!

Under Article XV, Section 3 of the Hawaii Constitution, while the legislature may propose amendments to the Constitution, such amendments can only be voted on at a general election. If the legislature at its special reapportionment session of 1964 had proposed any reapportionment amendment, it could have been voted on in the 1964 election, but that legislature did not so act. Having determined that the senate at least, must be reapportioned before the 1966 general election, this court, in the inception, is now compelled to attempt to achieve that result by following the constitutional method provided under Article XV, Section 2. In the event that the constitutional route fails or, if followed,

produced an invalid scheme of apportionment, only then would this or any other court be justified in attempting to assume the Herculean task of devising and enforcing a temporary reapportionment system.

In the event that a Constitutional Convention is convened, then in view of the questions and problems which have been raised before this court in this case, as well as before the Supreme Court of Hawaii in *Guntert* v. *Richardson, supra*, the delegates, in addition to providing for reapportionment of the senate, may also wish to reconsider the question of:

1. Whether it will continue to use registered voters as the apportionment basis, or change it to State citizen population eligible to vote (i.e., voter population), or citizen population, or total population.

2. Whether it is better to have one or both houses of the legislature composed of single member representative districts, or to have and justify[9] one or both houses composed, in whole or in part, of multi-member or floterial districts.

3. Whether decennial reapportionment of either or both houses should be made on or before June 1st of the year preceding the Federal census—as is now the case—or on a date soon after the taking of such census.

4. Whether the representative district lines should remain substantially as they now are or whether ultimately (i.e., after 1970) there should be redistricting in such a manner that the census tracts and representative districts can be coordinated for the statistical purposes necessary to implement the changes (if any) made in the basis of apportionment.

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[9] *Butcher* v. *Bloom*, 203 A.2d 556, 572-73.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Those provisions of Article III, Section 2 of the Constitution of the State of Hawaii fixing the number of senators per senatorial district are hereby declared unconstitutional and invalid. The remainder of Article III of said constitution is declared constitutional and valid.

2. The proviso at the end of the sixth paragraph in Section 2 of Article XV pertaining to amendments affecting representation in the Senate is hereby declared unconstitutional and invalid. The remainder of Article XV is declared constitutional and valid.

3. The plaintiffs and intervening plaintiffs have failed to prove that the apportionment of the House of Representatives of the Legislature of the State of Hawaii causes any invidious discrimination in the weight of their vote or that such apportionment is the result of arbitrary or capricious action. Their prayers for relief in this respect are therefore denied.

4. This court will not interfere with the convening or conducting of the business of the Third State Legislature in regular session in 1965, save and except that the parties herein are hereby enjoined from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until legislation, pursuant to the provisions of Article XV of said Constitution providing for the submission to the people of Hawaii, by special election to be held not later than August 1, 1965, the question: "Shall there be a convention to propose a revision of or amendments to the constitution?", and for any and all acts

required by law to implement such legislation, has been enacted into law. Such legislation shall also provide that if the vote be in the constitutional affirmative, then a special election shall be held not later than September 15, 1965 to elect delegates to the convention in the manner provided in the Constitution. Such legislation may include legislative action under Article XV, Section 2, 4th paragraph, of the Constitution. Such legislation shall further provide that the convention convene not later than October 15, 1965 and that it conclude its deliberation in time to submit its proposed constitutional amendments to the electorate of Hawaii at a special election to be held not later than January 30, 1966, including (but not limiting the convention thereto) provisions therein for reapportioning the Senate of Hawaii on a constitutionally valid basis. Such legislation shall also appropriate and make available funds for the expenses of such elections and convention.

5. The offices of all senators of the Hawaii State Senate are hereby declared vacant as of the day of the general election of 1966. Until such date, the existing offices of all senators elected under Article III, Section 2 of the Constitution, shall be valid.

6. This court retains jurisdiction of this action for all purposes, including but not limited to (a) considering such sanctions as may be appropriate if the orders of this court are not carried out; (b) judicially reapportioning the Senate in the event that the electors of Hawaii reject a constitutional convention, or the convention fails to propose an amendment reapportioning the Senate, or the electors reject such an amendment, or if any amendment of the convention does not insure the apportionment of the Hawaii State Legislature in

accordance with the requirements of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.

7. All other relief prayed for in the Complaint, Complaint in Intervention, and Cross Complaint is hereby denied.

DATED: Honolulu, Hawaii, this 17th day of February, 1965.

GILBERT H. JERTBERG
Circuit Judge

WILLIAM T. BEEKS
District Judge

MARTIN PENCE
District Judge

[R. 454]

FINAL ORDER ON MOTION TO ALTER OR AMEND JUDGMENT

As stated in this court's Decision and Order of February 17, 1965, a plan reapportioning the Senate of Hawaii must be operative for the 1966 general election, and this court did not in February and does not now wish to assume the task of devising a reapportionment scheme. Faced with the legislature's failure to act during its special reapportionment session of 1964, this court then felt compelled to channel reapportionment measures into the constitutional convention route.

Based upon the current actions of the legislators, followed by the representations by counsel for all parties to this suit that all are in accord with the objectives outlined in the motion to alter or amend

judgment, this court is now convinced that the legislative climate has changed and that the legislators presently in session are now prepared to undertake the formulation of a plan for reapportioning the Senate which can be Constitutionally justified. From the representations made, this court is satisfied that the multiple and accelerated special elections and a constitutional convention would cost well over $1,000,000, strain the State's election machinery, and force an as-yet-unsought-for constitutional convention upon the people of Hawaii, with attendant loss of time to the delegates.

This court is therefore prepared to grant the motion of intervenor-defendants Nelson K. Doi et al., and Elmer F. Cravalho et al., to alter the court's Decision and Order of February 17, 1965.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this court's order of February 17, 1965 be and is hereby altered in the following particulars. Item 4 beginning at the bottom of page 19, and item 6 beginning at the bottom of page 20, are amended to read as follows:

"4. The Senate shall be apportioned on the basis of the number of voters registered at the 1964 general election substantially in the manner outlined by the reapportionment plan for the Senate, set forth in Senate Concurrent Resolution No. 35, adopted by the Legislature of the State of Hawaii on March 1, 1965, and attached to the Motion to Alter or Amend Judgment filed in this court on March 1, 1965. Any such reapportionment plan shall apply to the 1966 elections and thereafter until an appropriate and legal constitutional amendment shall become effective.

"In furtherance of the above, the legislators and parties herein are enjoined from taking final action upon any legislation, except such actions as are necessary to organize the respective houses at such session and appropriate funds for the session, until the State legislature in regular session in 1965:

"(a) shall have enacted a reapportionment and redistricting plan for the Senate on the basis of 1964 registered voters (and applicable to the 1966 elections) and the same shall have become law;

"(b) shall have adopted a proposed constitutional amendment embodying pertinent provisions of the foregoing reapportionment and redistricting plan, to be presented to the electorate for ratification at the 1966 general election, in the manner provided by Article XV, Section 3, of the State Constitution; and

"(c) shall have enacted legislation, pursuant to the provisions of Article XV of the State Constitution, providing for submission to the people of Hawaii at the general election of 1966 the question: 'Shall there be a convention to propose a revision of or amendments to the Constitution?'."

"After (a), (b) and (c) shall have been enacted and adopted, and made operative, the same shall thereupon be submitted to this court for approval.

"If the measures set forth in paragraphs (a), (b) and (c) above shall not have been enacted and adopted by the legislature on or before the twentieth calendar day following the date of the order granting the motion to amend the said Decision and Order, and made operative, and if the same after hearing shall not have been approved by the court, then, as far as then and

thereafter applicable, item 4 on pages 19 and 20 and item 6 on pages 20 and 21 of the Decision and Order dated February 17, 1965 shall become automatically reinstated and thereafter remain in full force and effect as if the Motion to Amend the same had not been granted.

* * * * * * * * *

"6. This court retains jurisdiction of this action for all purposes, including but not limited to:

"(a) considering such sanctions as may be appropriate if the orders of this court are not carried out; and

"(b) judicially reapportioning and redistricting the Senate, in the event that the obligations of the parties above indicated are not fulfilled, or any reapportionment plan so enacted is not approved by the court, or the electors of Hawaii at the 1966 general election reject the proposed and court-approved constitutional amendment reapportioning the Senate, or under any other circumstances which this court shall deem appropriate."

In all other respects this court's Decision and Order of February 17, 1965 is reaffirmed.

Dated: Honolulu, Hawaii, this 9th day of March, 1965.

GILBERT H. JERTBERG
Circuit Judge

WILLIAM T. BEEKS
District Judge

MARTIN PENCE
District Judge

[R. 534]

MOTION TO ALTER OR AMEND ORDER OF MARCH 9, 1965

Intervenors-Defendants move the court to extend the twenty (20) day calendar period ending March 29, 1965, referred to in the third paragraph, page 3, of the court's Final Order of March 9, 1965, for an additional period of sixteen (16) calendar days after March 29, 1965.

DATED: Honolulu, Hawaii, March 29, 1965.

* * * * * * * *

[R. 535]

ORDER

GOOD CAUSE APPEARING THEREFOR, the foregoing Motion to Alter or Amend Order of March 9, 1965 is approved and allowed.

DATED: Honolulu, Hawaii, March 29, 1965.

/s/ MARTIN PENCE
Judge of the above-entitled Court

APPENDIX B

1. The Fourteenth Amendment to the Constitution of the United States.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Article III, Sections 1, 2, 3, 4 and 5, of the Constitution of the State of Hawaii.

ARTICLE III

THE LEGISLATURE

LEGISLATIVE POWER

Section 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

SENATE; DISTRICTS; COMPOSITION

Section 2. The senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. The districts, and the number of senators to be elected from each, shall be as follows:

First senatorial district: that portion of the island of Hawaii known as Puna, Hilo and Hamakua, five;

Second senatorial district: that portion of the island of Hawaii known as Kau, Kona and Kohala, two;

Third senatorial district: the islands of Maui, Molokai, Lanai and Kahoolawe, five;

Fourth senatorial district: that portion of the island of Oahu lying east and south of Nuuanu Street and Pali Road and the upper ridge of the Koolau Range from the Nuuanu Pali to Makapuu Point and all other islands not specifically enumerated, five;

Fifth senatorial district: that portion of the island of Oahu lying west and north of the fourth senatorial district, five; and

Sixth senatorial district: the islands of Kauai and Niihau, three.

HOUSE OF REPRESENTATIVES; COMPOSITION

Section 3. The house of representatives shall be composed of fifty-one members, who shall be elected by the qualified voters of the respective representative districts. Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

REAPPORTIONMENT OF HOUSE

Section 4. On or before June 1 of the year 1959, and of each tenth year thereafter, the governor shall reapportion the members of the house of representatives in the following manner: The total number of representatives shall first be reapportioned among four basic areas, namely, (1) the island of Hawaii, (2) the islands of Maui, Molokai, Lanai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered at the last preceding general election in each of such basic areas and computed by the method known as the method of equal proportions, no basic area to receive less than one member. Upon the determination of the total number of representatives to which each basic area is entitled, such total shall be reapportioned among the one or more representative districts within each basic area on the basis of the number of voters registered at

the last preceding general election within each of such representative districts and computed by the method known as the method of equal proportions, no representative district to receive less than one member. Upon any reapportionment, should the total number of voters registered in any representative district be less than one-half of the quotient obtained by dividing the total number of voters registered in the State by the total number of members to which the house is entitled, then, as part of such reapportionment, the basic area within which such representative district lies shall be redistricted by the governor in such manner that the total number of voters registered in each new representative district therein shall be more than one-half of such quotient.

The governor shall thereupon issue a proclamation showing the results of such reapportionment, and such reapportionment shall be effective for the election of members to such house for the next five succeeding legislatures.

MANDAMUS

Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the application of any registered voter, made within thirty days following the date specified above, to compel, by mandamus or otherwise, the governor to perform the above duty; and made within thirty days following the date of such proclamation, to compel, by mandamus or otherwise, the correction of any error made in such reapportionment.

ELECTION OF MEMBERS; TERM

Section 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

3. Article XVI, Section 1, of the Constitution of the State of Hawaii.

ARTICLE XVI

SCHEDULE
REPRESENTATIVE DISTRICTS

DESCRIPTION; NUMBER OF MEMBERS

Section 1. As provided in Section 3 of Article III until the next reapportionment, the representative districts and the number of members to be elected from each shall be as follows:

First representative district: that portion of the island of Hawaii known as Puna, one representative;

Second representative district: that portion of the island of Hawaii known as South Hilo, four representatives;

Third representative district: that portion of the island of Hawaii known as North Hilo and Hamakua, one representative;

Fourth representative district: that portion of the island of Hawaii known as Kau and South Kona and that portion of North Kona, for convenience herein referred to as Keauhou, more particularly described as follows: from a point at the seashore between the lands of Holualoa 1 and 2 and Puapuaa 2 running northeastly along the boundary of Holualoa 1 and 2 to Puu Laalaau; (2) easterly in a straight line to a point called "Naohueleelua" being the common corner of the lands of Puuanahulu, Kaohe and Keauhou 2nd; (3) southeasterly along the common boundary between Hamakua and North Kona districts to the summit of Mauna Loa; (4) westerly along the common boundary between Kau and North Kona districts to the easterly boundary of South Kona district; (5) northerly and westerly along the boundary between North and South Kona districts to the seashore; and (6) northerly along the seashore to the point of beginning, one representative;

Fifth representative district: that portion of the island of Hawaii known as Kohala and that portion of North Kona not included in the fourth representative district, one representative;

Sixth representative district: the islands of Molokai and Lanai, one representative;

Seventh representative district: the islands of Maui and Kahoolawe, five representatives;

Eighth representative district: that portion of the island of Oahu known as Koolaupoko and Koolauloa, two representatives;

Ninth representative district: that portion of the island of Oahu, for convenience herein referred to as Waialua and Wahiawa and a portion of Ewa known as Kunia and Waipio, more particularly described as follows:

Beginning at the seashore on the boundary between the Ahupuaas of Waimea and Pupukea and following along the North boundary of the Ahupuaa of Waimea to Puu Kainapuaa on the Koolau Range at the junction of the Ahupuaas of Laie, Waimea and Kawailoa, thence southeasterly along the top of the Koolau Range, passing over Puu Pauao and Puu Kaaumakua to the head of Kipapa Gulch, thence down along Kipapa Gulch in all its turnings and windings to Waiahole Ditch, thence southwesterly along Waiahole Ditch in all its turnings and windings to Reservoir No. 31 of the Oahu Sugar Company, thence following a direct line to Puu Palikea on the Waianae Mountain Range, thence northwesterly following along the top of Waianae Mountain Range, passing over Puu Kaua, Puu Kanehoa, Puu Hapapa, Puu Kumakalii, Puu Kalena, Puu Kaala to Puu Pueo, thence westerly along the boundary between the Ahupuaas of Kaena and Keawaula to the seashore at Kaena Point, thence easterly along the seashore to the point of beginning, two representatives;

Tenth representative district: that portion of the island of Oahu, for convenience herein referred to as

Ewa, (excluding Kunia and Waipio) and Waianae, more particularly described as follows:

Beginning at the seashore at Kaena Point, on the boundary between the Ahupuaas of Kaena and Keawaula, and following along said boundary to Puu Pueo on the Waianae Mountain Range, thence southeasterly along the top of the Waianae Mountain Range, passing over Puu Kaala, Puu Kalena, Puu Kumakalii, Puu Hapapa, Puu Kanehoa, Puu Kaua to Puu Palikea, thence following a direct line to Reservoir No. 31 of the Oahu Sugar Company, thence northeasterly along the Waiahole Ditch in all its turnings and windings to Kipapa Gulch, thence up along Kipapa Gulch in all its turnings and windings to the top of the Koolau Range, thence southeasterly along the top of the Koolau Range to the boundary between the Ahupuaas of Halawa and Moanalua, thence southwesterly along the boundary between the Ahupuaas of Halawa and Moanalua to the seashore, thence westerly along the seashore to the point of beginning, four representatives;

Eleventh representative district: that portion of the island of Oahu, for convenience herein referred to as Kalihi, more particularly described as follows: from the intersection of Kalihi and Auiki Streets running westerly along Auiki Street to Mokauea Street; (2) southwesterly along Mokauea Street Extension extended to a point on the outer edge of the reef; (3) westerly along the outer edge of the reef to a point on the Moanalua-Halawa boundary; (4) northerly and northeasterly along the Moanalua-Halawa boundary to the top of Koolau Range; (5) southeasterly along the top of Koolau Range to a place called "Puu Lanihuli"; (6) southwesterly along the top of the ridge between the lands of Kalihi, Kapalama and Nuuanu to Kalihi Street; and (7) southwesterly along Kalihi Street to the point of beginning, three representatives;

Twelfth representative district: that portion of the island of Oahu, for convenience herein referred to as upper Nuuanu, more particularly described as follows:

from the intersection of King and Kalihi Streets running northeasterly along Kalihi Street to the ridge between the lands of Kalihi, Kapalama and Nuuanu; (2) northeasterly along the top of said ridge to a point on the Koolau Range called "Puu Lanihuli"; (3) easterly along the top of said Range to Pali Road at the Nuuanu Pali; (4) southwesterly along Pali Road to Nuuanu Avenue and southwesterly along Nuuanu Avenue to School Street; (5) northwesterly along School Street to the center line of the Kapalama Drainage Canal (Waikiki Branch); (6) southwesterly along said Canal to the center line of the main Kapalama Drainage Canal; (7) southwesterly along said Canal to King Street; and (8) northwesterly along King Street to the point of beginning, three representatives;

Thirteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kapalama, more particularly described as follows: from the junction of the Honolulu Harbor Channel and the reef running westerly along the outer edge of the reef to Mokauea Street Extension extended; (2) northeasterly along Mokauea Street Extension extended to Sand Island Road; (3) northeasterly along Mokauea Street Extension to Auiki Street; (4) easterly along Auiki Street to Kalihi Street; (5) northeasterly along Kalihi Street to King Street; (6) southeasterly along King Street to the center line of the main Kapalama Drainage Canal; (7) northerly along said Canal to the center line of the Kapalama Drainage Canal (Waikiki Branch); (8) northeasterly along said Canal to School Street; (9) southeasterly along School Street to Nuuanu Avenue; (10) southwesterly along Nuuanu Avenue to the sea; and (11) southwesterly along the middle of Honolulu Harbor and Honolulu Harbor Channel to the point of beginning, three representatives;

Fourteenth representative district: that portion of the island of Oahu for convenience herein referred to as Pauoa, more particularly described as follows: from

the junction of the Honolulu Harbor Channel and the outer edge of the reef running northeasterly along the middle of Honolulu Harbor Channel and Honolulu Harbor to the intersection of Queen Street and Nuuanu Avenue; (2) northeasterly along Nuuanu Avenue to Pali Road and northeasterly along Pali Road to the top of the Koolau Range at the Nuuanu Pali; (3) easterly and southerly along the top of the Koolau Range to a point called "Puu Konahuanui"; (4) southwesterly along the top of the ridge between the lands of Nuuanu, Pauoa and Manoa to a mountain peak called "Puu Ohia" or "Tantalus"; (5) southwesterly along the top of the ridge between the lands of Makiki and Kalawahine to the intersection of Nehoa Street and Lewalani Drive; (6) southerly along Lewalani Drive and Piikoi Street to Wilder Avenue; (7) easterly along Wilder Avenue to Punahou Street; (8) southerly along Punahou Street to King Street; (9) westerly along King Street to Kalakaua Avenue; (10) southerly along Kalakaua Avenue to the center line of the Ala Wai Canal; (11) westerly along said Canal and along the line of said Canal extended to the outer edge of the reef; and (12) westerly along the outer edge of the reef to the point of beginning, five representatives;

Fifteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Manoa and Waikiki, more particularly described as follows: from the intersection of Kalakaua Avenue and the center line of the Ala Wai Canal running northerly along Kalakaua Avenue to King Street; (2) easterly along King Street to Punahou Street; (3) northerly along Punahou Street to Wilder Avenue; (4) westerly along Wilder Avenue to Piikoi Street; (5) northerly along Piikoi Street to Lewalani Drive; (6) northerly along Lewalani Drive to Nehoa Street; (7) northeasterly along the top of the ridge between the lands of Makiki and Kalawahine to a mountain peak called "Puu Ohia" or "Tantalus"; (8) northeasterly along the top of the ridge between the lands of Pauoa, Manoa and Nuuanu to a point on the Koolau Range called "Puu

Konahuanui"; (9) southeasterly along the top of said Range to a place called "Mt. Olympus"; (10) southwesterly along the top of Waahila Ridge to the top edge of Palolo Valley; (11) southwesterly along the top edge of said Valley to the forest reserve boundary; (12) southwesterly along the southeasterly boundary of St. Louis Heights Tract, Series 2 (File Plan 464) to the southerly boundary of said Tract 100 feet southeasterly from Alencastre Street; (13) southwesterly parallel to and 100 feet from Alencastre Street and St. Louis Drive to Waialae Avenue; (14) westerly along Waialae Avenue to Kapahulu Avenue extended; (15) southerly across Waialae Avenue and along Kapahulu Avenue to Kalakaua Avenue; (16) westerly along Kapahulu Avenue extended to the outer edge of the reef; (17) northwesterly along the outer edge of the reef to a point on the line extended of the center line of the Ala Wai Canal; and (18) easterly along said line to the point of beginning, six representatives;

Sixteenth representative district: that portion of the island of Oahu, for convenience herein referred to as Kaimuki and Kapahulu, more particularly described as follows: from a point at the seacoast at a place called "Black Point" running westerly along the seacoast to Kapahulu Avenue extended to the sea; (2) easterly across Kalakaua Avenue and easterly and northerly along Kapahulu Avenue to Waialae Avenue; (3) easterly along Waialae Avenue to a point 100 feet easterly of St. Louis Drive; (4) northeasterly across Waialae Avenue then parallel to and 100 feet from St. Louis Drive and Alencastre Street to the southerly boundary of St. Louis Heights Tract, Series 2 (File Plan No. 464); (5) northeasterly along the southeasterly boundary of said Tract to the forest reserve boundary; (6) northeasterly along the top ridge of Palolo Valley to the top of Waahila Ridge; (7) northeasterly along the top of Waahila Ridge to a point on the Koolau Range called "Mt. Olympus"; (8) easterly along the top of the Koolau Range to the top of the ridge between the lands of Waialae Nui and Palolo; (9) south-

westerly along the top of said ridge to a place called "Kalepeamoa"; (10) southwesterly along Mauumae Ridge to Sierra Drive; (11) southwesterly along Sierra Drive to Waialae Avenue; (12) easterly along Waialae Avenue to 13th Avenue; (13) southwesterly along 13th Avenue and Ocean View Drive to Kilauea Avenue; (14) westerly along Kilauea Avenue to Makapuu Avenue; (15) southwesterly along Makapuu Avenue to Diamond Head Road; and (16) southeasterly along Diamond Head Road to the Military Road and along the Military Road extended to the point of beginning, four representatives;

Seventeenth representative district: that portion of the island of Oahu not included in any other representative district on the island of Oahu together with all other islands not included in any other representative district, three representatives;

Eighteenth representative district: the islands of Kauai and Niihau, four representatives.

Wherever a roadway, or the intersection of one or more roadways, is designated as a boundary in any of the above descriptions, the center line of such roadway or intersection is intended as such boundary.

4. Article XV of the Constitution of the State of Hawaii.

ARTICLE XV

REVISION AND AMENDMENT

METHODS OF PROPOSAL

Section 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.

CONSTITUTIONAL CONVENTION

Section 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any ten-year period shall elapse during which the question shall

not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

ELECTION OF DELEGATES

If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.

Notwithstanding any provision in this constitution to the contrary, other than Section 3 of Article XIV, any qualified voter of the district concerned shall be eligible to membership in the convention.

Unless the legislature shall otherwise provide, there shall be the same number of delegates to such convention, who shall be elected from the same areas, and the convention shall be convened in the same manner, as nearly as practicable, as required for the Hawaii State Constitutional Convention of 1950.

ORGANIZATION; PROCEDURE

The convention shall determine its own organization and rules of procedure. It shall be the sole judge of the elections, returns and qualifications of its members and, by a two-thirds vote, may suspend or remove any member for cause. The governor shall fill any vacancy by appointment of a qualified voter from the district concerned.

RATIFICATION; APPROPRIATIONS

The convention shall provide for the time and manner in which the proposed constitutional revision or amendments shall be submitted to a vote of the electorate, but no such revision or amendments shall be effective unless approved at a general election by a majority of all of the votes tallied upon the question, such majority constituting at least thirty-five percent of the total vote cast at such election, or at a special election by a majority of the total vote tallied upon such question, such majority constituting at least

thirty-five percent of the total number of registered voters; provided, that no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation.

AMENDMENTS PROPOSED BY LEGISLATURE

Section 3. The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

The conditions of and requirements for ratification of such proposed amendments shall be the same as provided in Section 2 of this article for ratification at a general election.

VETO

Section 4. No proposal for amendment of the constitution adopted in either manner provided by this article shall be subject to veto by the governor.